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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

TIM TEICHERT, PERSONAL
REPRESENTATIVE OF THE
ESTATE OF MINERVA TEICHERT,

Plaintiff,

v.

THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,
BRIGHAM YOUNG UNIVERSITY,
BRIGHAM YOUNG UNIVERSITY
MUSEUM OF ART, DESERET
MANAGEMENT CORPORATION,
DESERET BOOK COMPANY, and
LATTER-DAY HOME LLC,

Defendants.

CASE NO. 8:23-cv-00180-FWS-JDE

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
TRANSFER VENUE**

Judge: Hon. Fred W. Slaughter
Hearing Date: May 18, 2023
Time: 10:00 AM
Courtroom: 10D

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1 **I. INTRODUCTION**

2 Plaintiff's pending action in the District of Wyoming ("Wyoming
3 Litigation") seeks to resolve factual questions about the circumstances under which
4 Minerva Teichert donated three paintings once displayed in the Cokeville Ward
5 Meetinghouse ("Cokeville Paintings") to the Church. The Wyoming Litigation is
6 in federal court because Plaintiff sought a declaration of ownership not just for the
7 physical Cokeville Paintings themselves, but also for the federal copyrights
8 therein.¹ ECF No. 37 ("Mot.") at 3–4. The very same Cokeville Paintings are at
9 issue in this case, and this Court will need to decide the very same factual
10 questions about their transfer to the Church.

11 That alone is sufficient to justify transfer under the first-to-file rule.
12 Contrary to Plaintiff's claim, the first-to-file rule does not require exact identity of
13 the parties and issues—only "substantial overlap." *See Kohn L. Grp., Inc. v. Auto*
14 *Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240–41 (9th Cir. 2015). Indeed, Plaintiff
15 recently agreed to extend the discovery schedule in the Wyoming Litigation
16 specifically because there is substantial overlap between the two cases. Plaintiff
17 admitted in a joint stipulation that "the parties in the California action are
18 substantially similar to the parties in the Wyoming Litigation . . . [and] the issues
19 in the Wyoming Litigation substantially overlap with the issues in [the] California
20 case." Victorson Decl. Ex. A at 2 (capitalization altered). Although Plaintiff
21 attempted to walk back its admission a week later, it continued to acknowledge
22 that "there certainly is some overlap in the parties in both cases." Victorson Decl.
23 Ex. B at 2.

24
25 ¹ To the extent Plaintiff now attempts to abandon copyright claims in the Wyoming
26 Litigation so that it can maintain those claims in this Court, permitting Plaintiff to
27 do so would raise a serious question about the ability of the Wyoming court to
28 maintain subject matter jurisdiction over that action. Transfer of this case to the
District of Wyoming would resolve any jurisdictional issues that might arise from
Plaintiff's gamesmanship.

1 Transfer to the District of Wyoming is also appropriate under 28 U.S.C.
2 § 1404(a). Plaintiff’s purported California connections in this dispute are thin.
3 Although Plaintiff alleged in its complaint that “contracts . . . oblige these parties
4 to litigate disputes thereunder in this judicial district,” Compl. ¶ 17, Plaintiff has
5 pointed to no such contracts, and it appears that allegation is entirely without
6 evidentiary support. Moreover, the California witnesses proposed by Plaintiff add
7 nothing to the case, and this suit and the Wyoming Litigation will turn on identical
8 Wyoming-based evidence. Again, Plaintiff has acknowledged as much in the
9 Wyoming Litigation, stipulating that “substantial judicial economy and avoidance
10 of waste of both party and judicial resources may be achieved through conducting
11 joint fact and expert discovery” in the two disputes. Victorson Decl. Ex. A at 2.
12 (Plaintiff made no attempt to back away from that stipulation.) When considering
13 “holistically where these two interconnected lawsuits should proceed,” the
14 “interest of justice, and especially the consideration of judicial economy, is the
15 most important factor of all.” *Sertant Cap. LLC v. Element Fleet Corp.*, No. 18-
16 cv-01234, 2018 WL 11354477, at *4 (C.D. Cal. Dec. 4, 2018) (internal quotation
17 marks omitted). The interest of justice here strongly favors transfer.

18 In sum, when Plaintiff selected Wyoming as its forum to litigate ownership
19 of the Cokeville Paintings, it asked the District of Wyoming to resolve a core set of
20 disputed facts. Those disputed facts are also at issue here. The Court should not
21 afford Plaintiff two chances to obtain a favorable factual determination. That is
22 particularly true in this case, where differing determinations in two courts would
23 create a conflicting and unclear path forward for all parties. Instead, the Court
24 should transfer this case to the District of Wyoming, where it can be consolidated
25 with the pending Wyoming Litigation.

1 **II. ARGUMENT**

2 **A. The First-To-File Rule Justifies Transfer.**

3 The first-to-file rule requires consideration of the “chronology of the
4 lawsuits, similarity of the parties, and similarity of the issues.” *Kohn*, 787 F.3d at
5 1240. Only the last two factors are disputed here.

6 **1. The First-to-File Rule Requires Only “Substantial 7 Similarity” of the Parties, and the Parties Here Are 8 Substantially Similar.**

9 Plaintiff objects that the parties are not “substantially similar” because only
10 one defendant overlaps across the two cases. ECF No. 40 (“Opp.”) at 8–10. To
11 begin with, that directly contradicts Plaintiff’s representation that “the parties in
12 the California action are substantially similar to the parties in the Wyoming
13 Litigation.” Victorson Decl. Ex. A at 2 (capitalization altered); *see also* Victorson
14 Decl. Ex. B at 2 (“[T]here certainly is some overlap in the parties in both
15 cases”). In any event, “exact identity of the parties” is not the correct legal
16 standard. *Kohn*, 787 F.3d at 1240. If it were, Plaintiff would be able to “skirt the
17 first-to-file rule merely by [adding] one party [to] a second lawsuit.” *See id.* The
18 Ninth Circuit has rejected such gamesmanship. Plaintiff’s reliance on an out-of-
19 context recitation from *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th
20 Cir. 1997), Opp. at 10, does not change the prevailing standard set forth in *Kohn*.

21 Here, the five non-Church defendants are not isolated accused infringers
22 connected only by their alleged infringing activities. The Church controls the other
23 defendants, ECF No. 37-2 ¶ 9, and Plaintiff has made the same general allegations
24 for all Defendants, *see, e.g.*, Compl. ¶ 28 (“The Church and/or one or more of its
25 related or affiliated entities, has mass reproduced, distributed and/or sold prints or
26 other reproductions of Minerva Teichert’s paintings without authorization”).
27 Courts “generally hold that privity or affiliation between/among defendants [across
28

suits] is sufficient to find” substantial similarity between parties. *See Elite Physicians Servs., LLC v. Citicorp Credit Servs., Inc. (USA)*, No. 06-cv-00086, 2007 WL 1100481, at *3–4 (E.D. Tenn. Apr. 11, 2007).

Moreover, contrary to Plaintiff’s assertions, Opp. at 9–10, the first-to-file rule does not require a conclusion that the Church will be held vicariously liable for the actions of the entities it controls. It merely requires that the other parties “represent the same interests” as the Church. *See, e.g., Ruoeey Lung Enter. Corp. v. Tempur-Pedic Int’l, Inc.*, No. 09-cv-00675, 2009 WL 10675241, at *2 (C.D. Cal. Sept. 14, 2009) (internal quotation marks omitted) (parties are “substantially similar” under the first-to-file rule when they have “similar interests”). All Defendants in this case seek to prove that their conduct accords with their respective rights in the disputed paintings, including the Cokeville Paintings that form the factual background for the claims against all Defendants. *See Compl.* ¶¶ 18–28.

2. The Issues Are Substantially Similar Because the Circumstances Under Which Minerva Teichert’s Paintings Came Into the Church’s Possession Are Relevant to Plaintiff’s Copyright Claims.

The first-to-file rule requires only that the issues in both cases be “substantially similar.” *Kohn*, 787 F.3d at 1240. Plaintiff admits that there is factual overlap between this case and the Wyoming Litigation. Opp. at 10. Plaintiff also admits that the Wyoming Litigation will determine the circumstances under which the Church came to possess the Cokeville Paintings. *Id.* at 11. What Plaintiff fails to acknowledge is that the same factual determinations *also* go to the heart of Plaintiff’s copyright claims. *Cf. Kohn*, 787 F.3d at 1240–41 (finding issues substantially similar where the question to be resolved was “at the ‘heart’ of the” first-filed action). If the District of Wyoming finds that Minerva Teichert

1 unconditionally transferred ownership of the Cokeville Paintings, those works may
2 be in the public domain pursuant to the doctrine of divestive publication. *See*
3 Mot. at 9–10. Their copyrights may also belong to the Church under the *Pushman*
4 doctrine. *Id.* at 11. Moreover, the same factual questions surrounding the transfer
5 of the Cokeville Paintings will arise with respect to the additional works at issue
6 here. *See id.* at 10–11.

7 Although Plaintiff derides the copyright “primer” in the opening brief, Opp.
8 at 11, it fails to actually engage with the substance of the law described therein.
9 First, it fails entirely to address the doctrine of divestive publication, which
10 necessarily turns on the facts surrounding Minerva Teichert’s relinquishment of
11 her paintings.

12 Second, Plaintiff challenges the *Pushman* case on the ground that it is
13 inconsistent with dicta in a Supreme Court case decided nearly a century earlier.
14 *See* Opp. at 12 & n.5 (citing *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1853)). But
15 *Pushman* discussed that dicta and expressly declined to follow it. *Pushman v. N.Y.*
16 *Graphic Soc’y, Inc.*, 39 N.E.2d 249, 251 (N.Y. 1942); *see also Parton v. Prang*, 18
17 F. Cas. 1273, 1277–78 (Clifford, Circuit Justice, C.C.D. Mass. 1872) (No. 10,784)
18 (distinguishing *Stephens* and holding that “it is well settled law that even copyright
19 is an incident to the ownership of a manuscript, and that it passes at common law
20 with the transfer of a work of art”). Plaintiff does not suggest that Wyoming (the
21 state where any transfers likely occurred) did not adopt the *Pushman* rule or assert
22 that Wyoming abrogated that rule by statute prior to the transfers. In any event, the
23 approach that the Wyoming courts would have adopted in the early twentieth
24 century is a question of Wyoming law best resolved by a Wyoming court. *See*
25 *infra* section II.B.3.b; *Riverview Med. Ctr. v. F.A. Davis Co.*, No. 08-cv-03770,
26 2008 WL 4754874, at *3–4 (D.N.J. Oct. 27, 2008) (transferring a case requiring
27 “detailed review and application” of transferee court’s state law).

B. § 1404(a) Separately Justifies Transfer.

1. Plaintiff’s Choice of Forum Should Be Given Little to No Weight.

Plaintiff insists that its forum choice is entitled to deference. Opp. at 15–16. But again, it fails to engage with the law. As explained, Mot. at 21–22, courts in this District afford little weight to the plaintiff’s chosen forum where, as here, “the forum is not the primary residence of either the plaintiff or defendant.” *Metz v. U.S. Life Ins. Co. in the City of N.Y.*, 674 F. Supp. 2d 1141, 1146 (C.D. Cal. 2009) (internal quotation marks omitted). That alone negates any deference to Plaintiff’s forum choice. *Allstar Mktg. Grp., LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1131 (C.D. Cal. 2009) (“Neither plaintiff is a citizen of this forum. . . . [T]he court [thus] accords [plaintiffs’ choice] little weight.”).

2. Personal Jurisdiction Is Appropriate in Wyoming if It Is Appropriate in California.

Plaintiff claims that the District of Wyoming lacks personal jurisdiction over Defendants. Opp. at 13–15. But the basis for personal jurisdiction in California is no different than the basis for personal jurisdiction in Wyoming. Plaintiff alleges that Defendants sell the disputed works “throughout the United States” via their websites. Compl. ¶¶ 38, 40, 49, 51, 58–59, 61, 69–70, 72. Plaintiff’s jurisdictional hook based on “promotion, advertising, marketing, offering for sale and sale” must therefore apply equally to California and Wyoming, regardless of total sales. *Id.* ¶ 15; *see Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999) (finding personal jurisdiction based solely on web sales and noting that jurisdiction can exist even when “the actual number of sales . . . [is] small”). Furthermore, the Church already consented to personal jurisdiction in the Wyoming Litigation, and it will (along with all other defendants) consent to personal jurisdiction in the District of Wyoming if necessary.

1 **3. Plaintiff’s Manufactured California Connections Should Be**
 2 **Afforded Little Weight.**

3 Plaintiff’s attempts to manufacture connections to this District are
 4 outweighed by what Plaintiff cannot dispute: that all parties are located outside of
 5 this state, that witnesses (including third parties) key to the factual issues in this
 6 case are located outside of this state and should not be required to testify on the
 7 same matters twice, and that the key events and agreements at the heart of this
 8 matter occurred outside of this state. Indeed, Plaintiff stipulated in the Wyoming
 9 Litigation that it sought an extension of discovery deadlines in order to conduct
 10 joint discovery with respect to overlapping issues. Victorson Decl. Ex. A at 2–3.

11 **a. Witnesses.**

12 Contrary to Plaintiff’s incorrect contention, Opp. at 16, Defendants
 13 identified third-party witnesses whose testimony will be key to the ownership
 14 issues at the heart of both cases. These third parties, Marian Wardle and Laura
 15 Howe, should not be subjected to discovery over the same issues in both Wyoming
 16 and California. *See* Mot. at 14–15; ECF No. 37-3 ¶ 9.

17 The only potential third-party witness Plaintiff identifies is Gina Teichert.
 18 Opp. at 18. But Ms. Teichert does not appear to live in this District, and she would
 19 have to travel to either Wyoming or this Court to testify. Victorson Decl. Ex. C
 20 (“Based in rural Napa County, California and ready to travel[.]”). It is also unclear
 21 what Ms. Teichert could say pertaining to the claims in this case. She might testify
 22 to the authenticity of the alleged communication in Plaintiff’s Exhibit D, but
 23 Plaintiff does not allege that she has personal knowledge of, *e.g.*, whether Plaintiff
 24 owns valid copyrights or the circumstances of the alleged infringing or unfair acts
 25 described in the complaint. Ms. Teichert is not a “key witness.”

26 Plaintiff also argues that transfer to Wyoming will inconvenience defendant
 27 Deseret Book’s California-based retail employees. Opp. at 18. The likelihood that
 28

1 such employees would testify here is negligible. Defendants would strenuously
 2 object to taking discovery from retail employees of Deseret Book in their
 3 individual capacities. Such discovery would be unreasonably cumulative and
 4 duplicative, unduly burdensome, and harassing of Deseret Book's individual
 5 employees, particularly because Plaintiff has made no suggestion that it will not be
 6 able to obtain documentary or 30(b)(6) testimonial evidence regarding the sales
 7 information it seeks. *See* Fed. R. Civ. P. 26(b)(2)(C), 30(b)(6), 45(d)(1).

8 **b. Familiarity with State Law.**

9 To the extent there are any viable California state law claims alleged here,
 10 Plaintiff admits that the District of Wyoming is fully capable of applying the
 11 relevant California law to the facts. *Opp.* at 20.

12 On the other hand, there are complex issues of Wyoming law at issue in this
 13 case. *See* *Mot.* at 8 & n.3, 16–17. The District of Wyoming is best positioned to
 14 sort out those issues, which go well beyond applying the federal statutes in the
 15 complaint and will touch on issues of Wyoming property law including intestate
 16 succession, probate, ownership, and possession. For example, Defendants do not
 17 concede that “the Teichert Estate is the rightful owner of” the artworks or
 18 intellectual property at issue. *See Opp.* at 3. Indeed, the Wyoming statute cited by
 19 Plaintiff states that “*when a person dies the title to his property, real and personal,*
 20 *passes to . . . the persons who succeed to his estate,*” even though property may
 21 still be “subject to the *possession* of the personal representative” for disposition
 22 purposes. Wyo. Stat. Ann. § 2-7-402 (emphases added). The plain language of the
 23 statute states that the title (legal ownership) of any intellectual property held by
 24 Minerva Teichert passed automatically to her heirs when she died. Whatever it
 25 means under Wyoming law for an estate to have “possession” of intangible
 26 property such as a copyright interest, the statute does not appear to grant the estate
 27 *legal ownership* of the copyrights, which is necessary to give the estate standing to
 28

sue for copyright infringement. *See* 17 U.S.C. § 501(b). In any event, the District of Wyoming is best positioned to resolve the underlying questions of Wyoming law that will affect issues of ownership and standing.

c. Forum Contacts and Contracts.

Plaintiff emphasizes the Church’s many members in California and other general contacts that Defendants may have in the state. But the correct inquiry must also examine “the contacts *relating to the plaintiff’s cause of action* in the chosen forum.” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (emphasis added). The numbers of Church members, storefronts, and enforcement attempts regarding intellectual property not at issue here have nothing to do with the copyright and false endorsement claims in this case.

The allegation that Defendants sold copies of Minerva Teichert works to California residents also does not establish substantial contacts for purposes of the § 1404(a) inquiry. *See Glob. Décor, Inc. v. Cincinnati Ins. Co.*, No. 11-cv-02602, 2011 WL 2437236, at *4 (C.D. Cal. June 16, 2011) (contacts factors “weigh[ed] heavily in favor of transfer” despite sales in California). Even if the Court considers California sales, Plaintiff also alleges that Defendants sold prints of the disputed works “all over the United States,” presumably including Wyoming. Giving Plaintiff’s argument its full weight would thus render the contacts factors neutral. *See* Compl. ¶¶ 5, 18–28, 40, 51, 61, 72; *Lather, Inc. v. Gilchrist & Soames, Inc.*, No. 19-cv-05868, 2020 WL 1140760, at *5 (C.D. Cal. Mar. 9, 2020). Because the number of prints sold in California cannot affect the result of this Court’s transfer analysis, Plaintiff’s alternative request for limited discovery regarding California sales should be denied. *See also supra* section II.B.2 (explaining why California sales also cannot affect personal jurisdiction).

Finally, despite Plaintiff’s allegation in the complaint that there are “contracts that oblige [the] parties to litigate disputes thereunder in this judicial

district,” Compl. ¶ 17, Plaintiff still has not identified a single agreement to back up its assertion. In fact, it appears that Plaintiff has no evidentiary support, and no hopes of developing evidentiary support, for this factual contention. *See* Fed. R. Civ. P. 11(b)(3). The only alleged agreements at issue in this case were formed in Wyoming, Mot. at 20–21, and nothing supports Plaintiff’s suggestion that § 1404(a) contemplates only written agreements. *See* Opp. at 24; *Thomas v. Woods*, No. 13-cv-09389, 2014 WL 12598869, at *3 (C.D. Cal. Aug. 26, 2014) (formation of an oral agreement in transferee district “weighs heavily in favor of transfer”). Similarly, if documents describing the alleged agreements Minerva Teichert made regarding her works exist, they most likely exist in Wyoming. To the extent relevant documents have already been produced in the Wyoming Litigation, it would be most efficient to consolidate discovery in a single court.

4. Transferring This Case Will Not Cause Delay.

Plaintiff maintains that transfer will lead to inefficiency, in part because more discovery will delay the Wyoming Litigation. Opp. at 24. But this is a peculiar assertion: Plaintiff *agreed to a delay* of the Wyoming Litigation in recognition of the fact that “joint fact and expert discovery” will lead to “substantial judicial economy and avoidance of waste.” Victorson Decl. Ex. A at 2. And the District of Wyoming has already adjusted deadlines in response to that request. *See* ECF No. 40-6. In any case, the asserted benefit of denying transfer—a faster determination of the ownership of the Cokeville Paintings—is far outweighed by the risk of inconsistent decisions on overlapping issues regarding the same paintings. *See* Opp. at 24–25; *supra* section II.A.2.

III. CONCLUSION

For the above reasons, the Court should grant Defendants’ Motion to Transfer Venue and deny Plaintiff’s request for leave to conduct expedited limited discovery.

1 Dated: May 4, 2023

Respectfully submitted,

2 LATHAM & WATKINS LLP

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8 Saints, Brigham Young University,

9 Brigham Young University Museum of

Deseret Management Corporation,

Deseret Book Company, and Latter-day

Home LLC

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants The Church of Jesus Christ of Latter-day Saints, Brigham Young University, Brigham Young University Museum of Art, Deseret Management Corporation, Deseret Book Company, and Latter-day Home LLC, certify that this Reply contains 3,166 words, which complies with the word limit of L.R. 11-6.1. The undersigned also certify that this Reply is 10 pages from Introduction to Conclusion, which complies with the page limit set forth in section VIII.c of this Court's Civil Standing Order (ECF No. 12).

Dated: May 4, 2023

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